IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1352

EX PARTE OBIE JOE LITTLETON

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. _____

EX PARTE OBIE JOE LITTLETON

Petitioner.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Obie Joe Littleton, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on February 23, 1978, affirming the conviction of the Petitioner in the United States District Court for the Middle District of Alabama, which judgment of conviction held the Petitioner to be guilty of violating Title 18, § 1006, United States Code and imposed a custodial sentence of two years.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, as yet unreported, appears as Appendix A to this Petition. The Court of Appeals affirmed the judgment of the United States District Court for the Northern District of Alabama, per curiam, under its Local Rule 21, without writing an opinion.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was rendered on February 23, 1978. On March 22, 1978, a stay of the issuance of the mandate was granted by the Court of Appeals pending the filing of this Petition for Writ of Certiorari to and including March 25, 1978. This Petition for Writ of Certiorari is to review that judgment of the said Court of Appeals and is filed less than thirty days after the judgment of said Court. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1), which said statutory provision is believed to confer jurisdiction on this Court

QUESTIONS PRESENTED

The Petitioner was tried and convicted in the United States District Court for the Middle District of Alabama for violating 18 U.S.C., § 1006. The questions presented are:

1. Whether under 18 U.S.C., § 1006 evidence of a conflict of interest without evidence of a failure to disclose or intent to defraud the institution involved is sufficient to withstand a motion for judgment of acquittal.

2. Whether a trial court's refusal to ask questions requested in writing by a Defendant on voir dire of prospective jurors, which questions are essential to the intelligent exercise of the voir dire right, constitutes a denial of due process and of the right to a fair and impartial jury.

3. Whether the refusal of a trial court to fairly and completely instruct the jury when timely and properly requested by the Defendant to do so as to the Defendant's theory of his defense constitutes a denial of due process.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V

No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

Constitution of the United States, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed . . . .

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18, § 1006

§ 1006. Federal credit institution entries, reports and transactions.

Whoever, being an officer, agent or employee of or connected in any capacity with . . . any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, or by the Administration, or any small business investment company . . . with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than Ten Thousand Dollars ($10,000.00) or imprisoned not more than five

years, or both.

Alabama Code, Title 7, § 789

Appeals from decrees of divorce must be taken within sixty days from the date upon which such decree of divorce was rendered.

Federal Rules of Criminal Procedure, Rule 24(a)

The Court may permit the Defendant or his attorney and the attorney for the Government to conduct the examination of prospective jurors or may itself conduct examination. In the latter event the Court shall permit the Defendant or his attorney and the attorney for the Government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

STATEMENT OF THE CASE

The Petitioner, Obie Joe Littleton, was indicted on December 1, 1976, in the Middle District of Alabama in a Four Count indictment, each Count charging violations of Title 18, § 1006, United States Code. Counts One and Two charged, in essence, that Littleton shared in the profits made from the construction by Richard Easterling of certain houses which First Federal Savings and Loan Association of Chilton County, Alabama, had financed. (A. 5-6). Littleton was the Managing Officer and the Director of the Association at that time. The indictment charged that this participation was with the intent to defraud the Savings and Loan Association. Counts Three and Four were dismissed on the Defendant's Motion for Judgment of Acquittal

at the close of the Government's case during the first trial of this case which ended in a mistrial on March 3, 1977, when the jury could not reach a verdict.

During the course of the second trial, which began on May 17, 1977, the Petitioner filed written requested voir dire questions. (A. 7-10). In questions nine, ten, and eleven the Petitioner sought to determine whether any prospective juror had read or heard about the Petitioner or the case from any source, the identity of the source and what had been heard. The Petitioner further requested that if a prospective juror stated that he had heard something that any subsequent answer be given individually and out of the presence of the other jurors. The trial court did ask whether any juror had heard or read anything about the Petitioner or the case, and in the presence of the other jurors asked those who responded whether what they had been exposed to would in any way prejudice them. The Court, however, refused to question the jurors out of the presence of the other jurors as to what they had heard or read.

The Court further refused to ask questions thirteen, twenty, twenty-two, and twenty-five. Question thirteen sought to determine whether the mere fact that the indictment charged the particular violation contained therein would in any way prejudice a juror against the Defendant. Question twenty sought to determine whether the juror would be inclined to give greater weight or credibility to the testimony of a witness merely because that witness was a government agent than the juror would be inclined to give the testimony of a private citizen. Question twenty-two sought to elicit from the prospective jurors whether because of some experience that they might have had with a savings and loan institution or other financial institution they had any bias or prejudice against one who had

been an officer of such an institution. Question twenty-five was designed to determine whether any juror had any prejudice or bias as a result of having been a victim of a crime in the past five years.

The Petitioner timely requested in writing that the Court give instruction number seven which explained that the Defendant's good faith, or absence thereof, could be considered by the jury and that they could consider the fact that there was no loss to the Association in determining whether the Defendant acted in good faith. (R. 9-26). Instead of giving instruction number seven in its entirety the Court merely instructed the jury that they could consider all of the evidence in determining whether the Defendant acted in good faith.

Petitioner also timely requested in writing that the Court give instruction number eleven which explained that a loss to the Association or the mere receipt of profits as defined in § 1006 was not a violation - there must also be an intent to defraud the Association. (R. 9-26).

The jury began its deliberations at 9:34 a.m. At 10:17 a.m. the jury sent word to the Court that they had a question:

> A question has come up of intent to defraud; is that as to cause a loss to a person or for personal gain? (A. 29).

In response to the question, the Court instructed the jury that intent to defraud means to act with a specific intent to deceive for the purpose of causing some loss to another or to bring about some gain to one's self. The Court further advised the jury that loss to the Savings and Loan Association was not a necessary element. (A. 29-31).

Defense counsel then specifically requested the Court to instruct the jury that the fact of no loss to the Association could be considered by the jury. The trial Judge stated that he had charged that earlier. Defense counsel advised the Court that he "had missed it" if the Court had so charged, and requested the Court to explain to the jury that the fact of financial gain to the Defendant was not conclusive of an intent to defraud. The Court refused and defense counsel expressed to the Court his concern that the supplemental charge being the last given would have a "greater impression on the jury" than the original longer charge. (A. 30-33).

The Petitioner made timely motions for judgment of acquittal at the close of the Government's evidence, at the conclusion of all the evidence, and after the verdict. All were denied. (R. Vol. 4, 258, 259, 422). The Petitioner's motion for new trial was denied. (A. 15-19).

The Petitioner was a member of the Alabama State Senate at the time of the trial. He also served as Managing Officer of the First Federal Savings and Loan Association of Clanton, Alabama. (A. 179, 264).

The Government's case consisted of testimony from Bobby Ray Cook, an employee of the Savings and Loan Association; Thomas Richard Easterling, a contractor who had paid to Petitioner a portion of his profits on certain houses which he had constructed on which First Federal Savings and Loan Association had made permanent loans; James Earl Johnson, a local Deputy Sheriff; John Allen Hines, Jr., a long time friend of Petitioner; John Curtis Smith, one of three persons for whom houses were constructed by Easterling and who obtained loans from First Federal; Harvey Barker, an examiner with the

Federal Home Loan Bank Board; and James E. Strickland, an agent of the Federal Bureau of Investigation. The testimony of these witnesses merely established that loans were made by First Federal to three separate individuals for whom Easterling constructed houses, that Easterling paid Littleton One Thousand Sixty-six Dollars Twenty-eight cents ($1,066.28) on one occasion and Two Thousand One Hundred Fifty-four Dollars ($2,154.00), on another as his share of the profits made from the construction of the houses. There was testimony that the One Thousand Sixty-six Dollars Twenty-eight cents ($1,066.28) check was at Littleton's request made payable to his friend, John A. Hines, and then endorsed by Littleton. Easterling testified that Littleton told him to proceed in that manner because Littleton was engaged in divorce proceedings and he did not want his wife to learn of the check. Hines testified that he and Littleton had been friends for twenty years and lived next door to each other at the time of the trial. He testified that he had lost nothing as a result of the transaction.

Easterling testified that Littleton had told him that he planned to leave the Association after the first of the year and that they intended to go full-time into business together at that time. There was evidence that Littleton and Easterling had borrowed Five Thousand Dollars ($5,000.00) as a construction loan to assist in construction of one of the houses. This loan was in the name of their Company, Chilton County Development Corporation, and was obtained from a financial institution totally unconnected to Littleton's.

No evidence was offered by the Government of any collusion between Easterling and Petitioner in order to get customers to go to First Federal to obtain loans or to utilize Easterling as the

builder. The Association employee who testified admitted that the loans were all good loans for the Association and that the Association had suffered no loss as a result of the loans.

The Government offered absolutely no evidence from First Federal Savings and Loan Association as to whether or not there had been any disclosure to it of Littleton's connection with Easterling. No member of the Board of Directors during the times pertinent to the indictment testified prior to the close of the Government's case.

Harvey Barker, the examiner from the Federal Home Loan Bank Board, and James E. Strickland, the F.B.I. Agent, both testified that in March of 1976, Littleton fully disclosed to them his connection with Easterling and his receipt of a part of the profits from the construction of the houses in question. The indictment was not returned until December 1, 1976.

After the close of the Government's case and the denial of Petitioner's Motion for Judgment of Acquittal, Petitioner offered evidence that conclusively established that there had been no loss to the Association as a result of the transaction in question, and in fact, that all of the loans were good loans for the Association. Littleton specifically denied any intent to defraud the Association. The other two persons to whom loans were made specifically denied that they had been referred to the Association by Easterling or to Easterling by Littleton.

REASONS FOR GRANTING THE WRIT

I.

The United States Court of Appeals for the Fifth Circuit erroneously denied Petitioner's

Motion for Judgment of Acquittal made at the conclusion of the Government's case.

The Court of Appeals chose not to write an opinion in this case. Consequently, it is impossible to know the rationale followed by that Court. Nevertheless, it is the rule in the Fifth Circuit that in reviewing a denial of a Motion for Judgment of Acquittal presented at the close of the Government's case only evidence presented as of the time of the motion can be considered by the reviewing Court. United States v. Henderson, 524 F. 2d 489, 490 n. 1 (5th Cir. 1975); United States v. Knighten, 505 F. 2d 112 (5th Cir. 1974).

The statute under which Petitioner was indicted requires that Petitioner has received a portion of the profits involved with intent to defraud The First Federal Savings and Loan Association. If the Association had knowledge of Petitioner's relationship with Easterling there could not be a violation of the statute. That is so because if the Association had knowledge there could be no deception. The Government offered absolutely no proof prior to the close of its case that the Association was not aware of the alleged illegal relationship.

The Government attempted to rely merely on the fact of the relationship to establish its case. Perhaps the Government was lulled into that position by the decision of the Court of Appeals in Beaudine v. United States, 368 F. 2d 417, 420 (5th Cir. 1966). In that case the Court stated that 18 U.S.C., § 1006 is "intended to do much more than forbid unsophisticated embezzlement, larceny or theft . . . [it] is a typical conflict of interest prohibition." However, in that case there was positive evidence of a scheme designed to defraud the

Association involved. In other similar cases decided by the Fifth Circuit there has been proof of a failure to disclose or positive misrepresentation to the institution involved. See, e.g., United States v. Musgrave, 444 F. 2d 755 (5th Cir. 1971); United States v. Spector, 326 F. 2d 345 (7th Cir. 1963).

Furthermore, a mere failure to disclose has been held not to constitute criminal fraud but mere "constructive fraud." Such fraud has been held not to be a criminal offense. Epstein v. United States, 174 F. 2d 754 (6th Cir. 1949); United States v. McNeive, 536 F. 2d 1245 (8th Cir. 1976).

The evidence offered by the Government intended to show an intent to defraud on the part of Littleton related absolutely in no way to the Association. Easterling testified during the Government's case that the acts alleged by the Government to constitute evidence of an intent to defraud, according to Littleton, were for the purpose of trying to prevent his estranged wife from learning of his receipt of any additional monies. He had recently obtained a divorce, and under Alabama Law, Alabama Code, Title Seven, § 789, at the time he received the checks the decree was still subject to attack.

Easterling testified during the Government's case that a box of checks for the Chilton County Development Company, which was a company that he and Littleton were using in connection with the construction of the houses, was mailed to the First Federal Savings and Loan Association in the name of the Company. Surely, that fact is no evidence of an intent to defraud the Association, and is in fact some evidence that the Association was aware of the relationship.

The appellate court must consider the evidence in the light most favorable to the Government in a situation such as this, Glasser v. United States, 315 U.S. 60, 86 L. Ed. 680 (1952). There must be some evidence from which the jury could conclude beyond a reasonable doubt that all of the necessary elements were proven. There was no evidence offered by the Government to show that the Association was not aware of Petitioner's relationship with Easterling. Based upon that serious omission a jury could not have concluded beyond a reasonable doubt that there was an intent to defraud. The issue raised here is an important question of Federal law which should be decided by this Court. Surely, Congress did not intend to make criminal a conflict of interest where there is a reasonable doubt whether the financial institution involved was aware of the conflict. Furthermore, a conviction based upon such a deficiency constitutes a serious denial of due process.

II.

The Refusal of the Trial Court to Ask on Voir Dire of Prospective Jurors the Written Questions Requested by Petitioner Denied the Petitioner Due Process of Law and the Right to Trial by an Impartial Jury.

This Court enunciated the standard in Aldridge v. United States, 283 U.S. 308, 310, 75 L. Ed. 1054, 1056 (1931): the scope of voir dire is committed to the sole discretion of the trial judge, subject to the essential demands of fairness. In Swain v. Alabama, 380 U.S. 202, 13 L. Ed. 2d 59 (1965), the Court noted that the principal purpose of the voir dire examination is to provide some basis for a reasonably knowledgable exercise of the right of challenge, whether for cause or peremptory.

In Swain, this Court upheld the right of a white prosecutor in a rural Alabama county to utilize all of his strikes against black persons. In doing so the Court discussed the purpose of the system of peremptory challenges:

> The voir dire in American trials tend to be extensive and probing, operating as a predicate for the exercise of peremptories, and the process of selecting a jury protracted. The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of the trial by jury.

380 U.S. at 218-219, 13 L. Ed. 2d at 771-772.

This Court went on to say that because of the purpose of the peremptory system and "the function it serves in a pluralistic society in connection with the institution of jury trial," that it could not"hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." The Court further said that the presumption in any given case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the Court. 380 U.S. at 222, 13 L. Ed. 2d at 773.

The Court seemed to be saying that peremptory challenges are an important means to satisfy "the appearance of justice." Said the Court:

> Indeed, the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of challenges for

> cause by removing the fear of incurring a juror's hostility for examination and challenge for cause.

380 U.S. at 219-220, 13 L. Ed. 2d at 772.

The questions which the trial court refused to ask were designed to determine whether there was any bias or prejudice on the part of any prospective juror. There is no way to know prior to the questioning of a prospective juror what his answer will be. The question on the surface which may appear inapplicable may deal with a subject about which a particular juror may feel very strongly and reveal some undisclosed bias or prejudice against the Defendant or his case. The various questions which were refused were designed to probe hidden prejudices which could affect their deliberations independent of the evidence.

The United States Court of Appeals for the Third Circuit, in United States v. Poole, 450 F. 2d 1082 (3rd Cir. 1971), held that the refusal of the trial court to permit the Defendant to determine whether any juror had previously been the victim of a criminal offense constituted reversible error. The Court rejected the Government's argument that such a question would be proper only where it is known in advance that because of the juror's prior experience he would be biased:

> It is true that in the instant case we do not know that any member of the jury which convicted Finkley (the Defendant) had been a prior crime victim. However, the absence of such evidence cannot overcome appellant's contention. It would indeed be disingenuous to argue that Finkley is now bound by the absence of proof of

that which he was prevented from proving.

450 F. 2d at 1083n2.

There is a conflict in the Circuits on this question in that the Second Circuit has held that the failure to ask such a question is not error. United States v. Bradley, 447 F. 2d 224 (2nd Cir. 1971), cert. denied, 404 U.S. 947, 30 L. Ed. 2d 263 (1971).

The same argument is applicable to the requested instruction pertaining to whether or not any juror might give greater weight to the testimony of a government agent merely because the witness was a government agent. Again, there is a conflict between the Circuits on this question. The Fifth Circuit has held the refusal of such question is not error, United States v. Gassaway, 456 F. 2d 624 (5th Cir. 1972), while the District of Columbia Circuit has held that refusal is error. Sellers v. United States, 271 F. 2d 475 (D.C. Cir. 1959); Brown v. United States, 338 F. 2d 543, 544-545 (D.C. Cir. 1964).

With regard to the examination of the jurors concerning what they had heard out of the presence of the other jurors, twelve of thirty-three jurors responded that they had heard of the case either in conversation or over television, radio or had read of the case in the newspapers. Petitioner was an Alabama State Senator at the time of the trial, and there had been a previous trial only a short time before in which there had been a mistrial. There obviously had been publicity about the case. It was extremely important to Petitioner to know what the prospective jurors had heard. The fact that they were asked in the presence of the other jurors whether whatever they had heard would influence them was not sufficient.

As noted by the Court of Appeals for the District of Columbia Circuit in Coppedge v. United States, 272 F. 2d 504, 508, (D.C. Cir. 1959), cert. denied, 368 U.S. 855, 7 L. Ed. 2d 52 (1961), "It is too much to expect of human nature that a juror would volunteer, in open Court, before his fellow jurors, that he would be influenced in his verdict by a newspaper story of the trial."

If peremptory challenges are to have any meaning and the appearance of justice is to be satisfied, probing questions on voir dire must be permitted. If the Constitution of the United States does not permit examination into the motives of a white prosecutor in a rural Alabama community in striking all black jurors in a case in which the Defendant is black, surely a trial Judge should not be permitted to decide on the basis of judicial economy that questions should not be asked which a Defendant had deemed essential to elicit any possibility of prejudice. The refusal of the Court to ask these questions constituted a denial of due process and a denial of Petitioner's right to a fair and impartial jury. The decision of the Court of Appeals is in conflict with the principles enunciated in Aldridge, supra, and Swain, supra.

III.

The trial court's refusal to instruct the jury as to the Petitioner's theory of defense denied Petitioner due process of law.

The written requested instructions refused by the Court were designed to present to the jury Petitioner's defense that he acted in good faith and that they could consider the fact that the Association had suffered no loss as the result of his acts. They were further designed to illustrate to the jury that the mere fact of loss to the Association or gain to a Defendant is not sufficient; there must be proof of an intent to defraud.

At the time the trial court gave its supplemental instruction to the jury the Judge stated that he thought he had already instructed the jury with reference to the admissibility of the fact of no loss to the Association. However, he had done so in the prior trial where a mistrial had been the result, but he did not do so in the instant case. The Fifth Circuit has previously held that a Defendant in a criminal case is entitled to have his theory of defense fairly presented to the jury. United States v. Musgrave, 444 F. 2d 755, 764 (5th Cir. 1971); Moore v. United States, 356 F. 2d 39 (5th Cir. 1966). The failure to follow that standard in this instance constitutes a denial of due process and further constitutes such a departure from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision over the lower federal courts.

In Bollenbach v. United States, 326 U.S. 607, 90 L. Ed. 350 (1946), Justice Frankferter emphasized that when a jury makes its difficulties known the trial court should "clear them away with concrete accuracy." 326 U.S. at 612-613.

In this case, the jury after deliberating for almost forty-five minutes asked the question concerning the relationship of intent to defraud and loss and gain. The trial court's answer left the obvious impression that if there was gain to Petitioner or loss to the association there was of necessity an intent to defraud. Such is not the law, and Petitioner specifically sought to have the trial court instruct the jury that the fact of financial gain is not conclusive of an intent to defraud and further to instruct the jury that they could consider the fact of no loss to the Association in determining whether or not there was an intent

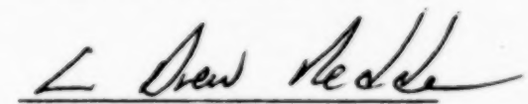
to defraud. The refusal of the trial court to so instruct the jury is in conflict with this Court's decision in Bollenbach v. United States, supra, and other decisions of the Court of Appeals, United States v. Carter, 491 F. 2d 625, 634 (5th Cir. 1974); United States v. Diamond, 430 F. 2d 688 (5th Cir. 1970); Perez v. United States, 297 F. 2d 12 (5th Cir. 1971).

The decision of the Court of Appeals in affirming the actions of the trial court is contrary to the principle established in Bollenbach v. United States, supra. Further, the sanctioning of such procedures by the Court of Appeals calls for the exercise of this Court's power of judicial supervision of the administration of criminal justice in the lower federal courts.

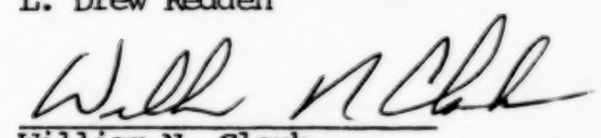
CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



L. Drew Redden



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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing petition upon the Honorable David L. Allred, Assistant United States Attorney, Middle District of Alabama; and the Honorable Wade H. McCree, Jr., Solicitor General, Depart-

ment of Justice, Washington, D.C., by mailing a copy of the same in the United States mail, properly addressed and with sufficient postage prepaid, this the 23rd day of March, 1978.

William N. Clark, Of
Counsel for Petitioner

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 77-5415

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OBIE JOE LITTLETON,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Alabama

(February 23, 1978)

Before GOLDBERG, GODBOLD, and SIMPSON,
Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21. [1]

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[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F. 2d 966.
